



**FINDINGS OF FACT**

Claimant, a long-term employee of respondent, began having upper extremity difficulties several years after beginning his job with respondent. Claimant's job duties required he lift boxes weighing from 38 to 98 pounds on a regular basis.

On October 23, 2005, while helping his father build a trailer, claimant lost hold of a drill when the bit caught and spun the drill around. Claimant was struck around the thumb area of his right hand. Claimant was referred to board certified orthopaedic surgeon James L. Gluck, M.D., on November 2, 2005. Dr. Gluck diagnosed a contusion injury, but also, after nerve conduction testing, found significant ulnar nerve compression in claimant's right elbow. Nerve conduction tests identified severe right ulnar nerve neuropathy at the elbow and carpal tunnel syndrome (CTS) bilaterally. Claimant underwent surgery on December 16, 2005, consisting of an ulnar nerve decompression with anterior transposition. On May 5, 2006, Dr. Gluck performed a left elbow medial epicondyle release. Claimant was rated in Dr. Gluck's August 1, 2006, report, pursuant to the fourth edition of the *AMA Guides*,<sup>1</sup> at 20 percent to the right upper extremity for mild to moderate ulnar nerve neuropathy and 10 percent to the left upper extremity for medial epicondylitis, post surgery. Claimant was found to be at maximum medical improvement (MMI) on July 13, 2006. Claimant was not provided an impairment to his right hand by Dr. Gluck as claimant was not symptomatic in that hand at the last examination.

Claimant was referred by his attorney to board certified plastic surgeon Lynn D. Ketchum, M.D., for an examination on November 16, 2006. Claimant was diagnosed with right trigger thumb, moderate to severe cubital tunnel syndrome in the right elbow, compression of the ulnar nerve at the right elbow, moderate to severe right carpal tunnel syndrome and moderate left carpal tunnel syndrome. On March 9, 2007, Dr. Ketchum performed a right carpal tunnel release, flexor tenosynovectomy, neurolysis of the right ulnar nerve at the elbow and trigger thumb release.

On May 8, 2007, claimant was injured when he stepped into a manhole in his flooded front yard. He struck his nose and right elbow. The elbow condition after the fall was worse as claimant had a bruise and increased pain. Additionally, the right elbow wound from the surgery opened up and was draining. Claimant was treated with antibiotics, and restricted from working until the wound healed. Claimant also missed about two weeks of physical therapy due to the fall. Claimant testified that the right elbow was not made worse from the fall. Dr. Ketchum supported claimant's opinion, stating that the fall only temporarily aggravated the elbow condition. Claimant also suffered what he thought was a spider bite shortly after the fall, and his release to return to work was

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<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

extended about two weeks due to that incident. Dr. Ketchum stated the “possible” spider bite only temporarily aggravated the elbow condition.

Dr. Ketchum rated claimant at 20 percent to the right upper extremity for moderate carpal tunnel syndrome and 10 percent to the right upper extremity for mild cubital tunnel syndrome, for a 30 percent upper extremity rating at the 210-week level. Dr. Ketchum also rated claimant at 20 percent to the left upper extremity at the 200-week level for moderate carpal tunnel syndrome. The ratings were all pursuant to the fourth edition of the *AMA Guides*.<sup>2</sup> Dr. Ketchum acknowledged that he had been advised by Emporia Physical Therapy & Fitness that claimant had missed physical therapy from May 1, through May 21, 2007. He acknowledged that attendance at physical therapy leads to a better result, particularly with range of motion and strength findings. Claimant has returned to his regular employment with respondent, but does limit his lifting to under 20 pounds.

### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant’s burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>3</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.<sup>4</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>5</sup>

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.<sup>6</sup>

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<sup>2</sup> *AMA Guides* (4th ed.).

<sup>3</sup> K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

<sup>4</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>5</sup> K.S.A. 2005 Supp. 44-501(a).

<sup>6</sup> K.S.A. 44-510e(a).

Claimant suffered multiple injuries to his upper extremities while working for respondent. The ratings provided by Dr. Gluck were not adopted by the ALJ. The Board agrees that questions regarding Dr. Gluck's ratings exist in this record. Dr. Gluck diagnosed claimant with bilateral carpal tunnel syndrome after November 4, 2005, EMGs indicated the condition existed bilaterally, yet failed to consider a rating for the condition. CTS was discussed in several of Dr. Gluck's reports and was listed in the June 1, 2006, report as an active problem. CTS was listed on July 13, 2006, in the Work Status report as a current diagnosis, but permanent restrictions on that date do not indicate the conditions for which the restrictions are being given. Plus, the rating report of August 1, 2006, assigns no rating for CTS, even though CTS was a current diagnosis only 3½ weeks before. Additionally, after the rating by Dr. Gluck, claimant was referred to Dr. Ketchum and underwent additional surgeries to his right wrist, right elbow and right thumb. Claimant was not referred back to Dr. Gluck for consideration of these conditions.

Respondent contends that claimant's condition was aggravated by the fall in claimant's yard and the possible spider bite. Yet, claimant was not referred back to Dr. Gluck for consideration of these alleged aggravations. Only Dr. Ketchum examined claimant after these incidents. His opinion that the fall and the alleged spider bite resulted in only temporary aggravations is uncontradicted in this record. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.<sup>7</sup>

The Board finds the opinions of Dr. Ketchum to be the most persuasive and adopts his ratings in affirming the ALJ.

### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. The functional ratings of Dr. Ketchum are the most credible and are adopted by the Board.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

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<sup>7</sup> *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated December 23, 2008, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael G. Patton, Attorney for Claimant  
Ryan D. Weltz, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge